IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1438

SOPHIA E. SELMAN, as Executrix of the Estate of RICHARD J. SELMAN, Deceased,

and

SHIRLEY MARIE SHARRATT, as Executrix of the Estate of GEORGE S.H. SHARRATT, JR., Deceased,

Petitioners,

v.

THE UNITED STATES,

Respondent.

REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

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of the Estate of RICHARD J.
SELMAN, et al, Petitioners

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

In reply to the Solicitor General's Brief for the United States in Opposition, Petitioners submit the following comments and counter-arguments.

I.

The Secretary's Failure to Make Required Administrative Findings

The Government, in its Brief responding to the Petition for Writ of Certiorari, correctly states the U.S. Court of Appeals for the Federal Circuit "did not condone the omission of administrative findings" but found "the error to be harmless."

What the Government fails to refute is that the Court of Appeals was inferring (really guessing) the basis on which the Secretary acted.

As pointed out on pages 20 and 21 of the Petition there are various grounds under which the Secretary might have considered he was acting. Thus the Secretary may have considered he was acting (or declining to act) "for the President" under 10 U.S.C. §5149(b) with no strings attached as

the Government and lower Court both thought. Or he might have considered he was acting, as constrained under 10 U.S.C. §1552 to correct an error, as former Secretaries Chafee and Warner would have acted given the opportunity to do so, as the Court of Appeals thought.

Yet further, he may have acted on non-civilian recommendations obtained outside Section 1552 channels without informing the Board, Petitioners or their counsel.

Petitioners' discovery to determine the basis for the Secretary's actions was cut off because the lower Court concurred with the Government that the Secretary of the Navy could and did act directly under §5149(b). Moreover, because there was neither discovery nor trial, evidence that the

Secretary had not treated all AJAGs alike, contrary to the Court's premise, was never brought to light.

The Government has not cited any case, in which required administrative findings were not made, that it was proper on judicial review to deny discovery and select, among conflicting possible rationales, a basis to sustain the action.

The Government does not deny that this case, if permitted to stand, will establish such a precedent. Nor does it deny that, at the very least, it tells those in the Armed Services, veterans and their widows that in the realm of judicial review they are second class citizens.

II.

The Court Overturned a Longstanding Judicial and Administrative Interpretation to Compute Retired Pay on Basis of Highest Pay Received

A considerable portion of the Government's Brief relates to the lower Courts' distinction of Powers v. United States, 401 F.2d 813, 185 Ct. Cl. 481 (1968), with the instant case.

But it is significant to note that the Government does not dispute that Powers v. United States has been a keystone for subsequent administrative decisions that military retirement pay should be based on the highest active duty pay received.

On the question of whether or not certiorari should be granted, the issue of whether Powers should be construed narrowly or has been effectively overruled does not seem of over-

riding importance, albeit we submit the Courts and Government are wrong.

What is important is that Powers with a number of other cases were followed by both the Comptroller General of the United States and the Department of Justice for the broad proposition that retired pay of members of the Armed Services should be based on the highest rate of pay received on active duty.

This is confirmed by 49 Comp. Gen. 618 (1970) wherein the Comptroller held:

> We have recently been advised by the Assistant Attorney General, Civil Division, that the Department of Justice is unaware of any argument not previously presented to the Court of Claims which might persuade it to reverse its holdings in Satterwhite v. United States, 123 Ct. Cl. 342 (1952); Friestedt v. United States, 173 Ct. Cl. 447 (1965); Neri v. United States, 145 Ct. Cl. 537

> (1959); Powers v. United States, 185 Ct. Cl. 481 (1968); and Miller v. United States, supra, [180 Ct. Cl. 872 (1967)], which he stated indicate the disposition of the Court to hold that the language in the various statutes indicates the intent of Congress that the retired pay of members of the armed services should be based upon the highest rate of pay received on active duty.
>
> Upon further review of the question it appears that the Department of Justice has presented to the Court of Claims every argument suggested by us in this class of cases. On the basis that further litigation would result in no material change in its interpretation of the law, we have concluded that we will follow the broad principle enumerated by the Court of Claims in those cases.

The foregoing was subsequently followed in a Comptroller General's decision of May 3, 1976, File B-184382. Moreover, the Comptroller's opinion in File B-198516 of July 25, 1980, held when the noun "grade" is used [in

Title 10, U.S. Code] without qualifying or definitive adjectives, such "grade" may be an "officer" or "pay" grade.

But the lower Courts ignored these administrative interpretations. Whatever may have been the reasons for their decisions, observance of long-standing administrative law principles were not among them.

III.

Conclusion

The BCNR didn't make findings that it should have made. The Secretary of the Navy was required to make findings, but he didn't. Petitioners were denied discovery by the lower Court because it thought the Secretary could and did act retroactively under §5149(b) with unfettered discretion. The Court of Appeals in the absence of

required findings or any discovery or trial, postulated the Secretary acted under a different statute, surmised a reason for his action under such statute, held this reason was proper if (assuming contrary to fact) it was applied to all, and finally construed retirement pay statutes in Title 10 diametrically opposite to all prior applicable precedents, administrative and judicial.

It is instructive that the Government does not deny the case represents a significant erosion to judicial remedies and rights heretofore available to members of the Armed Forces. But for their sacrifices, now and in the past, we would not be a free country. So Government at all levels should bend over backwards to ensure these people are not disen-

franchised from their rights as citizens, whether constitutional or statutory, more than the nature of the military profession demands.

The petition for certiorari should be granted.

Respectfully submitted,

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May 18, 1984